

Why One Legislator Cares About Data Practices

By Rep. Mary Liz Holberg (R-Lakeville)

Editor's Note: The Multiple Jurisdiction Network Organization (MJNO) referenced by Rep. Holberg was a computer database operated by the Minnesota Chiefs of Police Association containing information about 8 million law enforcement contacts with adults and juveniles. Information ranged from parking violations to murders. As part of the operation of the system, individuals were labeled as suspects, witnesses, perpetrators, victims, etc. Access to the database was limited to law enforcement personnel. As attention focused on the system, it was determined that it lacked appropriate security protections.

As a freshman legislator in 1999, I was given the dreaded assignment to the Civil Law Committee. Not an attorney, I was in the minority and struggled to keep up with all of the "lawyer" talk, but tried when possible to interject the perspective of the average citizen. One of my first tasks was the omnibus data practices bill, which is a yearly exercise in changes to data classifications as a result of evolution of public policy and technology improvements. Looking back, I took the assignment with great reluctance and with not a clue where I would be a short five years later.

I learned a lot that first year and continued to take an interest in the responsibility of government to protect an individual's privacy as well as guard the use of sensitive information on individuals. The explosion in technology has forced policymakers to re-examine data practices standards. Each year we struggle to achieve a balance between the right to privacy and the need

to keep the public informed.

This was especially evident last summer when citizens contacted me regarding the Multiple Jurisdiction Network Organization (MJNO). Quite frankly, my first impression was that the citizens had it wrong. How could a database exist that the Legislature was unaware of and that had such poor security that the public regularly had access to millions of files containing private information? Unfortunately, the citizens were right and we had a real mess in Minnesota.

One individual who contacted me said he had been surrounded by four police officers and "encouraged" to submit to a search of his fanny pack. He had been participating in a "support our troops" demonstration and had not broken any laws. Obviously upset by this encounter, he tried to find out why he had been singled out for this search. When he contacted the local police department, a clerk shared that maybe the police had received information from MJNO that prompted the search. As he worked to learn more, he was denied access to his information in the MJNO database in nearly every request for information. Given his level of frustration, he contacted legislators for help.

Data Practices

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Information Policy
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Administration

Data Practices: Why One Legislator Cares

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Long story short, eventually it was determined that the database had outdated and inaccurate information regarding his ability to carry a gun. The police suspected he had a gun in his fanny pack and used the inaccurate information to “justify” their search. (There was no gun in the pack, although he had a valid permit to carry.)

MJNO was an integrated database that contained the records of police contacts with individuals in nearly 200 jurisdictions. The system contained over 8 million records, but there was no effective policy for individuals to review the data in the system, let alone correct inaccuracies. The initial intent of MJNO was great. Allowing police officers to access the records of other departments in a quick and efficient manner obviously enhanced public safety. Unfortunately, the nearly total disregard for the Minnesota Data Practices Act resulted in the system being shut down. This was an expensive lesson in both costs to the taxpayers and the termination of an effective public safety tool.

I also experienced a fierce backlash from the law enforcement community because of my role in bringing MJNO’s problems to light. Instead of taking responsibility for the shortcomings of their system, they chose to attack me. This really opened my eyes to the attitudes of some public servants. Many feel that the laws concerning data classification and distribution are a nuisance and have even gone so far as to state that they are not important. They would like all information that they hold to be confidential and avoid oversight of their actions.

As a result of this experience, I have been struggling with legislation that would begin to update our statutes to address the changes in technology. While hundreds of millions of dollars have been spent developing

CriMNet, Minnesota’s integrated criminal justice information system, it is apparent that data classification and dissemination has been virtually ignored. (The first estimate from government offices of the cost of my proposed bill was over \$25 million in the first year to basically bring the system into compliance with current law.) It has been amazing to hear how much money will be needed to upgrade the nearly new systems.

The Legislative Auditor did an evaluation of Minnesota’s CriMNet program and raised many concerns regarding data practices. I respect law enforcement’s goal of wanting access to maximum amounts of data, but grow weary of their resistance to accountability for the accuracy and use of it.

Given my experience, it is very clear that we as public policymakers and individuals who value our privacy are going to be involved in a constant and heated battle to assure that the Fair Information Practice Principles* are respected. I shudder to think what will happen when the public wakes up some day and realizes that nearly every action that they take is recorded in some form or another in some big database in the sky.

After five years of working on these issues and now as chair of the Civil Law Committee, I have developed a keen interest in trying to assure that, at least at a government level, citizens’ right to privacy is preserved. I cannot begin to guess which issues will confront us in the next five years, but I know that we will need constant vigilance to assure that we do not weaken the standards that have guided the Minnesota Data Practices Act for the last 30 years.

**The Fair Information Practice Principles include rights for individuals, such as the ability to access and challenge the accuracy of data about themselves. The Principles were first published in a 1973 federal report and have served as a basis for data practices and privacy laws and private sector privacy policies all over the world since that time.*

New opinion index available

Those of you familiar with the topical index to advisory opinions published by IPAD are aware that it is available electronically on IPAD’s website. Unfortunately, changes in software and operating systems over time have caused IPAD to lose the ability to make index updates available in a usable format – until now.

With this issue of *FYi*, IPAD announces the debut of a “new and improved” topical index, which replaces its predecessor. The index is online at www.ipad.state.mn.us/docs/opindex.doc.

Users will note that revisions have been made in both format and organization. The index is also up

dated to include all opinions issued through the end of March 2004. New opinions will be indexed as they are issued. IPAD wishes to thank the staff in Administration’s Management Analysis Division for their assistance with this project.

We hope the index will assist you in researching advisory opinions. Because the index is a work in progress, IPAD welcomes any comments, questions or suggestions for improvements. Please direct your communications to Brooke Manley at 651.282.3888 or brooke.manley@state.mn.us.

Editor's Note: 'Turn Out A Light'

By Don Gemberling, Editor

As the old country western song says, "Turn out the lights. The party is over." Which is this old western – but not quite a country – guy's way of saying: May 4, 2004, will be my last day as Director of the Information Policy Analysis Division of the Department of Administration of the State of Minnesota. On that day I will have completed 36 years and 4 days of employment with Administration.

In August 1973, when I was working as an analyst in the Local Government Services Division of what was then called the Information Systems Division, my boss told me he had two new assignments for me. Specifically, I was to act as staff to two committees working on geocoding and privacy and security standards for information systems. The Geocoding Committee most often sent me off to my dictionary to try to plumb lots of technical jargon. The Security and Privacy Committee sent me, in part, to practical use of some of my academic training in history, English and political science. The latter assignment also started a process for me of being fascinated with the making and communication of public policy, the struggle of making policy really work, and the absolute joy of working with fascinating issues and people.

The actual work of the Security and Privacy Committee, which was composed of representatives of state and local government, education, the judiciary, law enforcement, the media and other citizens, turned out to be a review of something called "data privacy" legislation authored by John Lindstrom, a state representative from Willmar. Representative Lindstrom had developed his bill in close cooperation with Dan Magraw, an Assistant Commissioner in Administration. (Daniel B. Magraw, and not yours truly, is the true father of the "Data Privacy Act" that over time became the "Minnesota Government Data Practices Act.") The Committee recommended changes to the Lindstrom bill, which the Representative approved.

In 1974, the Lindstrom bill went to the Senate and acquired a number of amendments, most of which were authored by Senator Robert Tennesen of Minneapolis. Those amendments were strongly influenced by the Fair Information Practice Principles, which had only recently been developed. One of those amendments continues to be named after Senator Tennesen. The "Data Privacy Act," as it was unofficially known, became effective on August 1, 1974. It was the first legislation of its kind enacted in this hemisphere.

The legislation required the Commissioner of Administration to perform a number of duties. As I needed a

new assignment and had detailed knowledge of the legislation, I got tagged to do the detail work associated with the Commissioner's duties. With that, I began a full-time career as one of the state's experts on the "data law."

There are very few people in this country who work full-time on issues of privacy, fair information practices and public access to government data. When budget cuts do not get in the way, and those few of us actually get together for a professional interaction with colleagues from Canada, we often have reasonable disagreements over whose law is better, what works best and how issues should be approached. However, there is one point on which we always have absolute unanimity. We count ourselves as being blessed with being able to work on issues in which we actually believe and issues that are vitally important to the very idea of democracy and human liberty.

So, after serving under seven governors; working for at least 11 commissioners and probably 25 other supervisors and managers; having physically moved my office at least 21 times; having helped the Legislature make several hundred pages of public policy; having answered thousands of questions about the law (yes, there are still no dumb questions, but there are some pretty silly ones); having "done more with less and less" for far too long; having written hundreds of pages of articles; having made more than 1,000 presentations; having worked successfully with legislators of all political persuasions in both the House and the Senate; having written or edited 650 advisory opinions; having negotiated hundreds of compromises; having helped my fellow public servants work through hundreds of difficult situations and issues; having helped many citizens actually effectively use the rights they enjoy; and having lived long enough to see almost everyone with whom I started state employment long since gone and to be a part of the birth of my first grandchild, it is time to go on to other things.

I want to thank my exceptional staff: Brooke Manley, Catherine Scott, Janet Hey, Katie Engler and Linda Miller. It has been a joy to be your boss. I think of them as colleagues and not people to be supervised. Their fine work and dedication will continue so that most of the lights will still be on in the Information Policy Analysis Division. This Division's accomplishments over the years of its existence would not have been possible without their fine and professional work.

Editor's Note

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Opinion Highlights

The following are highlights of recent Commissioner of Administration advisory opinions. All Commissioner's opinions are on the IPAD website at www.ipad.state.mn.us.

04-002: The City of Duluth asked about the classification of data related to a disciplinary proceeding involving an employee who initially was served with a notice of termination but who grieved the action and later was reinstated. The Commissioner opined that because no final disposition had occurred pursuant to Minnesota Statutes, section 13.43, subdivision 2(b), only the following data are public: the employee's name in connection with the fact that a complaint or charge exists, and the status of the complaint or charge.

04-004: An individual asked whether the School Board in Independent School District 276, Minnetonka, had provided proper notice that the reorganization of the ArtsCenter would be acted on at the Board's September 11, 2003, special meeting. The Commissioner, interpreting Chapter 13D, the Open Meeting Law, opined that items discussed at special meetings are limited to the stated purpose of the meeting. Here, the Board did not give proper notice.

04-006: The Minnesota Board of Pharmacy denied a reporter access to data about entities that were the subject of complaints made in 2003. The Commissioner noted that while section 13.41 protects certain "data on individuals," it does not protect any "data not on individuals." The Commissioner opined that if the Board maintains data responsive to the request, the data are public.

04-007: An individual made a standing request to Independent School District 11, Anoka Hennepin, for certain data about his/her child. The District refused to honor the request. The Commissioner opined that pursuant to Chapter 13, government entities must honor standing requests for data.

04-009: An individual asked whether Gary Fischler and Associates (GFA), an organization that contracts with the Minnesota Department of Employment and Economic Development, violated his/her Chapter 13 rights. The Commissioner opined that the data subject's rights

were violated because GFA (1) did not provide a complete and proper Tennessee warning notice, and (2) had the individual sign an informed consent authorizing release of data that did not exist at the time the consent was signed.

04-016: The City of North Mankato asked if it would violate the Chapter 13 rights of a minor data subject if released to a minor's parent a list of library books borrowed by the minor. Pursuant to section 13.40, subdivision 2(a), data that reveal the materials a library patron has borrowed are private. The Commissioner noted that parents are entitled to gain access to private data about their minor child, unless the child requests the data be withheld and the entity makes an appropriate determination as described in Minnesota Rules, section 1205.0500. The Commissioner opined that the City would not violate the rights of the minor if it released the list of books unless the City, as guided by the rules, appropriately is withholding the data.

04-017: The City of Thief River Falls noted that the dollar value of an employee's health insurance benefit is public under Chapter 13 and asked whether HIPAA (the federal Health Insurance Portability and Accountability Act of 1996) affected the classification of the data. The Commissioner opined that the data are public. If the City is considered to be a covered entity for the purposes of HIPAA, 45 C.F.R. § 165.512(a)(1) appears to allow the release of the dollar value data upon a request pursuant to section 13.03. If the City is not considered to be a covered entity for the purposes of HIPAA, HIPAA does not apply and the data are public pursuant to Chapter 13.

04-019: An individual was denied access to copies of data that the Middle-Snake-Tamarac Rivers Watershed District maintains. The District refused to make copies because the individual's attorney had not yet paid a bill for copies requested previously. The Commissioner noted there is no provision in Chapter 13 limiting an individual's access to copies of data if someone other than the individual owes a government entity money for unpaid copies of data.



Advice from the Swamp Fox*

**Francis Marion, "the Swamp Fox," a colonial officer from South Carolina in the Revolutionary War, was renowned for hiding in swamps while carrying out guerilla warfare against the British.*

Dear Swamp Fox:

I am the responsible authority for Frozen Loon County. An employee recently sent me a letter stating that data we have about her in her personnel file are inaccurate and incomplete. She wants the data fixed right away. She says the bad data are preventing her from getting a promotion. Her letter mentions section 13.04, subdivision 4. Do I have to do something?

Signed: Patrick Responsible Authority

Dear Patrick,

Thank you for sending this example of a data challenge. We routinely see situations where government entities have trouble with these types of proceedings. A data challenge is one of the provisions in the Data Practices Act where, if the data subject and the responsible authority don't perform their respective roles, the law cannot function as it should.

Section 13.04, subdivision 4 requires you, the responsible authority, to respond to this data challenge. While you can have others in the county help you evaluate the employee's claims and determine what the response should be, the statute says that the responsible authority makes the final determination whether the challenged data are accurate and/or complete.

So, what standard do you follow to decide if the challenged data are accurate and/or complete? There are definitions for both of these terms: data are "accurate" when they are reasonably correct and free from error. (Minnesota Rules, section 1205.1500, subpart 2(A)); and data are "complete" when they reasonably reflect the history of an individual's transactions with a particular entity (in your case, the county). Also, the definition of "complete" in Minnesota Rules, section 1205.1500, subpart 2(B) says that omissions in an individual's history that place the individual in a false light are not permitted.

As you review the challenge, ask yourself the following questions:

- ✓ Is the employee actually presenting a challenge to data about her? In other words, this employee can't complain about data about another employee or about a situation. For example, the

employee can challenge that the data from her last performance evaluation are wrong, but can't challenge data about another employee or about the process used to do performance evaluations.

- ✓ Can you tell from the employee's letter what data are being challenged and what is wrong? If not, reject the challenge and ask for that detail.

For assistance in reviewing the data challenge presented by the employee, you might want to review the information that the Information Policy Analysis Division (IPAD) makes available at its website, www.ipad.state.mn.us. Look under "other publications" and then "information materials" for *Challenging the Accuracy and Completeness of Data*. While written for data subjects, it can give you, the responsible authority, guidance on how the data challenge process should work.

Once you know the data being challenged and the basis for the challenge, you can proceed with your review and evaluation. Section 13.04, subdivision 4 requires that you, the responsible authority, determine whether the challenged data are accurate and/or complete. You'll probably need to look at the challenged data and the information provided by the employee and evaluate whether the data that Frozen Loon County holds meet the definitions of "accurate" and "complete."

You have 30 days to make your determination and communicate it to the employee in writing. If you decide the data are accurate and/or complete as they exist, tell the employee that this is your determination and that she has the right to appeal to the Commissioner of Administration. A written notification to the employee will shorten the appeal period available to her from 180 to 60 days (Minnesota Rules, section 1205.1600, subpart 2). If you determine that the data are not accurate or complete, then inform the employee how the data will be corrected and make sure that the corrections are made.

If you correct data, section 13.04, subdivision 4(a)(1) also requires the county to notify past recipients of the incorrect data, if any, of the corrected data. The employee is entitled to give you a list of recipients to notify.

Questions about data challenges can be directed to IPAD. Contact information is published on page 6 in this newsletter.

The Swamp Fox

Editor's Note

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The evolution of the Division into a source for professional information and assistance also would not have been possible without strong support from a number of legislators and from most of the Commissioners under whom I served. Thank you so very much.

At the risk of being maudlin, I also want to thank the thousands of public servants, reporters, legislators, attorneys and citizens I have been privileged to serve over these last 36 years. In those years in which I actually had or took the time to ask myself, "What do you really want to do with your life?" the answer almost always was: help others. So, thank you for helping me realize that life goal.

Although I am leaving state government, do not be surprised to see me elsewhere working on the issues that have been the focus of my career.

"CLICK."



**Information Policy
Analysis Division**

Questions or comments?

Contact the Information Policy Analysis Division at 201 Administration Building, 50 Sherburne Avenue, St. Paul, MN, 55155; phone 800.657.3721 or 651.296.6733; fax 651.205.4219; email info.ipad@state.mn.us.

On the Internet: www.ipad.state.mn.us.

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This document can be made available in alternative formats, such as large print, Braille or audio-tape by calling 651.296.6733.

For TTY communication, contact the Minnesota Relay Service at 800.627.3529 and ask them to place a call to 651.296.6733.

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About temporary classifications

Minnesota Statutes, section 13.06, establishes a process whereby government entities may apply to the Commissioner of Administration to temporarily classify, as not public, public data that the entity maintains. Temporary classifications that have been approved by the Commissioner are sent to the Legislature at the beginning of each legislative session, in the form of proposed legislation, for permanent enactment.

In 2003, the Commissioner approved two temporary classifications, which currently are under consideration by the Legislature as part of Senate File 1889 and House File 2087:

- ✓ Minnesota service cooperatives offer group health, dental and long-term disability plans to Minnesota school districts and other political subdivisions. The Commissioner approved a nonpublic classification for claims experience and all related information received from carriers and claims administrators participating in these plans, and survey information collected from participating employees and employers, except when the executive director of a service cooperative determines that release of the data will not be detrimental to the plan or program.
- ✓ The Commissioner also approved a nonpublic classification for preliminary and final market value appraisals of personal and intangible property owned by the City of Eden Prairie, until the negotiating parties exchange appraisals or enter into a purchase agreement.

Additionally, the Commissioner approved a private classification for certain data that are created or collected by the Office of Health Facility Complaints (OHFC) during investigations relating to maltreatment of vulnerable adults; however, this temporary classification was disapproved by the Attorney General, so the data retained their status as public data. The Legislature currently is considering language in Senate File 1889 and House File 2087 that would classify the OHFC investigative data as private data on individuals.

